IN THE HIGH COURT OF UTTARANCHAL/UTTARANKHAND AT NAINITAL

Criminal Jail Appeal No. 165 of 2005
(Old No. 656 of 1991)

Padam Singh
S/o Gaur Singh
R/o Village Guyawan
P.S. Jauljivi
District Pithoragarh. …….Appellant

Vs.

State …….Respondent.

ALONGWITH

Criminal Appeal No. 101 of 2006
(Old No. 2749 of 1986)

Padam Singh
S/o Gaur Singh
R/o Village Guyawan
P.S. Jauljivi
District Pithoragarh. …….Appellant

Vs.

State …….Respondent.

Mr. Lalit Sharma, Amicus Curiae for the appellant.
Mr. Amit Bhatt, Additional Government Advocate for the State.

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble Dharam Veer, J.

Oral: Hon'ble Prafulla C. Pant, J.

These two appeals, preferred under Section 374 of Code of Criminal Procedure, 1973 (herein-after for brevity referred as Cr.P.C.), are directed against the

judgment and order dated 21.11.1985, passed in Sessions Trial No. 09 of 1985, whereby the then learned Sessions Judge, Pithoragarh, has convicted appellant Padam Singh under Section 302 of Indian Penal Code, 1860 (herein after referred as I.P.C.) and sentenced him to imprisonment for life.

2. Prosecution story, in brief, is that on receiving information on 12.06.1985 from P.W. 1 Sher Ram that a dead body was lying between villages Deval and Bagicha, the police party consisting of Sub-Inspector Man Singh along with Constables Kailash Chandra, Mahipat Singh, Posi Ram of police station Dharchula, proceeded towards the place where the dead body was lying. The dead body was identified as that of one Trilok Singh. On inspection, police party found that deceased has suffered ante mortem injuries, as such, it suspected the commission of murder of Trilok Singh. The police party prepared the inquest report (Ext. A-10) and also other necessary papers like sketch of the dead body (Ext. A-11), police form No. 13 (Ext. A-12) for sending the dead body for post mortem examination and other connected papers. The dead body was sent for post mortem examination along with letter (Ext. A-14) through constables Kailash Chandra and Mahipat Singh. Blood stained soil and the simple soil were also collected from the spot. Dr. B.S. Bisht conducted the post mortem examination on the dead body on 13.06.1985 at about 9:15 P.M. on the dead body of

Trilok Singh and found following ante mortem injuries:-

1. **Lacerated wound 6 inches X 2 inches X bone deep with visible fracture on right parietal region, 5 inches above right ear. Bony creptus present. Direction- Longitudinal**

   (paralled to sagital).

2. **Lacerated wound 2 inches X 5 inches X muscle deep on forehead, 5 inches right to midline. Direction oblique.**

3. **Abraded contusion 10 cm X 10 cm on right shoulder.**

4. **Swollen neck front and sides due to effusion of blood.**

5. **Abraded contusion on both hands-left forearm size of injury left hand 2 cm X 2 cm right hand 2 cm X 3 cm.**

6. **Abraded contusion 10 cm X 6 cm (longitudinal) on the right scapular region.**

7. **Abrasion 3 cm X 4 cm on left mid axillary line.**

8. **Abrasion 3 cm X 2 cm on upper lip.**

9. **Abraded contusion on the front of chest 8 cm X 6 cm.**

10. **Abraded contusion 2 cm X 2 cm on right leg.**

The Medical Officer prepared the post mortem examination report (Ext. A-9) and opined that duration since death was about 1 ½ days. As to the cause of death, the doctor opined that death occurred due to coma as a result of head injury. On 14.06.1985, the police registered the crime No. 36 of 1985 under Section 302 I.P.C. and made necessary entries in the general diary, a copy of which is Ext. A-7. After examining the complainant- P.W. 1 Sher Singh, the Investigating Officer inspected the place of occurrence and prepared site plan (Ext. A-17). During the course of the investigation, several persons including Kesar Singh (P.W. 4), Har Singh (P.W. 6), Dhan Singh (P.W. 5) and many others were examined. It was revealed on interrogation of the witnesses that on 11.05.1985, deceased along with others was in a marriage party of Gagan Singh's son. Appellant/accused Padam Singh along with other 'BARATIES', reached at the Bride's place at about 8:30 P.M. on that day. However, thereafter appellant Padam Singh along with deceased Trilok Singh went towards Dharchula from the Bride's place in search of more liquor. Witnesses Kesar Singh, Dhan Singh and Har Singh saw the above two going together and the deceased was last seen with the appellant. The Investigating Officer on 16.06.1985

could apprehend appellant Padam Singh while he was about to cross Indo-Nepal border near Ghatibagar, Baluakot. According to the prosecution, appellant Padam Singh after his arrest, got recovered the stone (Ext. 1) by which he admitted to have hit the deceased on the fateful night. The police got prepared Ext. A-1 (memo of said recovery) and its site plan (Ext. A-18). Before submitting the charge sheet, the Investigating Officer made an application to the Chief Judicial Magistrate that accused Padam Singh wants to confess his guilt. On this, the Chief Judicial Magistrate, Pithoragarh, nominated Shri Prabhat Mittal (P.W. 7) Sub-Divisional magistrate, as a person before whom the accused/appellant Padam Singh was to be produced for recording his statement under section 164 Cr.P.C. The Sub-Divisional Magistrate after taking necessary precautions, as required under section 164 Cr.P.C. recorded the statement (Ext. A-2) of the accused/appellant Padam Singh. Thereafter charge sheet appears to have been filed before the Magistrate by the Investigating Officer.

3. Chief Judicial Magistrate, on receiving the charge sheet, gave necessary copies, as required under section 207 of Cr.P.C., to the accused and committed the case to the Court of Sessions for trial. Learned Sessions Judge after hearing the prosecution and the accused, framed charge of offence punishable under Section 302

I.P.C. against the accused Padam Singh, who at that stage pleaded not guilty and claimed to be tried.

5. On this, prosecution go Mittal, P.W. 1 Sher Ram (informant), P.W. 2 Deb Singh (brother of the deceased, who identified the dead body), P.W. 4 Kesar Singh (who last saw the deceased with the accused), P.W. 5 Dhan Singh, P.W. 6 Har Singh (who last saw the deceased with the accused), P.W. 7 Shri Prabhat Mittal, Sub-Divisional Magistrate, who recorded the statement of accused/appellant under section 164 Cr.P.C., P.W.8 Head Constable Mohan Chandra, P.W. 9 Constable Jaipal Singh, P.W. 10 Mohan Singh and P.W. 11 Sub-Inspector Harpal Singh (Investigating Officer). The statements and the evidence, adduced on behalf of the prosecution was put to the accused under section 313 of Cr.P.C. in which the accused did admit the fact that he was in 'BARAAT' along with the deceased. However, as to the rest of the contents he denied the prosecution story. No evidence was adduced on behalf of the defence. After hearing the parties, learned Sessions Judge, found the accused Padam Singh guilty of charge punishable under Section 302 I.P.C., and on hearing the parties on sentence, sentenced the convict under section 302 I.P.C. to life imprisonment. Against this, these two appeals (one from the jail and another through appellants' counsel) were preferred before Allahabad High Court from where these appeals

are received by transfer to this Court under Section 35 of U.P. Reorganisation act, 2000, for it disposal.

6. This fact is not denied to the appellant that he was in the marriage party on 11.06.1985 with deceased Trilok Singh. The fact that on that night Trilok Singh had an unnatural death is established from the post mortem examination report (Ext. A-9). Formal proof of said document was dispensed with and its genuineness was admitted by the defence counsel during the trial. The ante mortem injuries found on the person of the deceased had already been mentioned by this Court earlier in one of the preceding paras. The statement of P.W. 6 Har Singh proves that appellant Padam Singh was last seen with Trilok Singh, as both of them left the marriage party and went towards Dharchula. This witness has also established that the duo was in search of more liquor. The Investigating Officer got recovered the stone (Ext. 1) on pointing out of appellant Padam Singh and the said fact is also established from the statement of witnesses examined on behalf of the prosecution. The most important piece of evidence against the appellant Padam Singh is his statement (Ext. A-2) recorded by Sub-Divisional Magistrate (P.W. 7 Shri Prabhat Mittal) under section 164 Cr.P.C.

7. The statement of accused/appellant Padam Singh recorded under Section 164 (Ext. A-2), shows that he admitted having gone towards Dharchula along with

Trilok Singh (deceased) on 11.06.1985 in search of more liquor to enjoy the marriage party. It is also admitted by the convict that they had more drinks and yet they wanted more. According to the statement of the convict, recorded under section 164 Cr.P.C. when they reached near Binmana, in a gorge, deceased started hurling abused at him on which he gave a blow with a stone lying at the place of quarrel. The convict has further admitted that he left Trilok Singh at the place of incident in an injured condition lying there. (This Court has already pointed out that as per the post mortem report, Trilok Singh, has died due to coma on account of ante mortem head injury). The Sub-Divisional Magistrate has given the statement on oath that accused/appellant Padam Singh was told before recording the statement that he is not bound to make confessional statement, as the same could be used against him. At the end of the statement, the Sub-Divisional Magistrate in Ext. A-2 further made necessary endorsement, as required under Section 164 Cr.P.C.

8. Section 164 of Cr.P.C. is reproduced below:-

"164. Recording of confessions and statements- *(1) Any Metropolitan Magistrate or Judicial Magistrate, may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time*

afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any

confession he may make may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magisrate."

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is so to be inquired into or tried."

9. In view of principle of law laid down in ***Ammini Vs. State of Kerela 1998 CR.L.J. 481 (Supreme Court),*** the coluntary statement of the accused made before the Magistrate under section 164 Cr.P.C. cannot be ignored if the compliance of said section is made by the Magistrate while recording the statement. Learned Amicus Curiae assisting the Court on behalf of the appellant argued that the appellant was made to give the

statement under Section 164 Cr.P.C. under pressure by the police. However, the record reveals that the appellant was not in the police custody, rather the statement was recorded after one week of his arrest i.e. on 24.06.1985. There is nothing on the record to suggest or to create doubt as to the genuineness and that the accused did not give the statement voluntarily to the Magistrate.

10. It is also argued on behalf of the appellant that there is no motive of commission of crime and the chain of circumstances placed by the prosecution is not complete. Had it been a case of purely circumstantial evidence, this Court would have appreciated the submission of the learned counsel. However, since the guilt is admitted by the accused himself under Section 164 Cr.P.C., as such even if the chain of circumstances is not complete the evidence adduced on behalf of the prosecution to prove the charge framed against the accused cannot be disbelieved. We are of the view that from the evidence on record, the prosecution has been successful in proving that the accused Padam Singh caused death of Trilok Singh (deceased).

11. However, after hearing learned counsel for the parties, this Court is of the view that though the culpable homicide committed by the appellant Padam Singh has been proved on the record but the same is

covered under Exception 4 to Section 300 of I.P.C., which reads as under:

"Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

12. From the evidence on record, it is proved that deceased and the accused were enjoying the marriage party together and were in a drunken state and from there they proceeded in search of further drinks and on reaching at a lonely place, they started quarreling. And when deceased started hurling abuses at the accused, he picked up a stone and hit the same on the head of the deceased. There appears neither any motive or any intention on the part of the accused to kill the deceased. Therefore, the charge which has been made out against the appellant is not the one punishable under Section 302 I.P.C. but that of Para-2 of Section 304 I.P.C. That being so, the accused should have been convicted by the trial court under Section 304 I.P.C. and not under Section 302 I.P.C.

13. For the reasons as discussed above, we are inclined and do hereby partly allow both the appeals. Appellant shall stand convicted under Section 304 Part-II I.P.C. instead of 302 I.P.C. The conviction under section 302 I.P.C. and sentence of imprisonment for

life awarded by the trial court is set aside. Instead, the appellant is sentenced to rigorous imprisonment for a period of six years under Section 304 Para-II I.P.C. The period already undergone by the appellant shall be adjusted from the sentence awarded by this Court. The record reveals that the appellant had been in jail since 16.06.1985 to 02.01.1988. Again he is in jail since 20.07.2006. The lower court record be sent back to the trial court to ensure that the appellant serves out the remaining unserved part of sentence.

(Dharam Veer, J.) **(Prafulla C. Pant, J.)**

Dt: 12.02.2007

Sweta